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Office of Administrative Law Judges
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Issue Date: 18 April 2003

CASE NO. 2002-LHC-1719

OWCP NO. 15-43739

In the Matter of:

CYNTHIA STEWART,
Claimant,

v.

NAVY PERSONNEL COMMAND,
Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party in Interest.

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For the Employer

Before: Paul A. Mapes
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case involves a claim arising under the Non-Appropriated Funds Instrumentalities Act, 5 U.S.C. §8171 *et seq.*, extension of the Longshore and Harbor Workers' Compensation Act, as amended (hereinafter, the "Act" or the "Longshore Act"), 33 U.S.C. §901 *et seq.* A trial on the merits of the claim was held in San Francisco, California, on October 16, 2002. Both the claimant and the employer were represented by counsel, but no one appeared on behalf of the Director. During the trial, the following exhibits were admitted into evidence: Claimant's Exhibits (CX) 1-29

and Employer's Exhibits (EX) 1 to 13. After the trial, the parties submitted the following additional exhibits: EX 14 (transcript of November 13, 2002 deposition of Dr. Ernest Miller), and CX 30 (transcript of November 13, 2002 deposition of Dr. Mathias Masem).

BACKGROUND

The claimant, Cynthia Stewart, was born on April 12, 1955. EX 13 at 7. She completed the 11th grade and attended one year of vocational school computer training. CX 16 at 34, EX 9 at 23-29, EX 13 at 4. The claimant is right-handed. EX 5 at 39.

In 1988, the claimant reported an injury to her neck while employed by a nursing home operated by the State of Alaska. CX 16 at 33. As a result, the claimant apparently received temporary disability compensation. Tr. at 54. In 1994, the claimant claimed neck and back injuries as a result of falling while working as a bartender for the Coast Guard in Alaska. CX 16 at 33. According to the claimant, she was precluded from working for "a period of years" because of this injury. Tr. at 55.

On October 1, 1998, the claimant began working as a bartender for the Morale, Welfare, and Recreation department at the Pearl Harbor Naval Station in Hawaii, which is also known as Barber's Point. EX 9 at 23, 25. She was assigned to work between one and 19 hours per week at the basic pay rate of $9.97 per hour. EX 9 at 23. At her hiring, as part of a self identification of handicap form, the claimant defined herself as having a nonparalytic orthopedic back impairment. EX 9 at 35. She proceeded to work without any physical restrictions. Tr. at 38. The claimant subsequently was rated as an excellent worker. CX 26 at 49.

On June 1, 1999, the claimant underwent an MRI scan of her entire spine. EX 6 at 87; CX 16 at 32. It revealed the following conditions: (1) mild-to-moderate canal stenosis at the midcervical level with disk protrusions at C4-5 and C5-6, (2) mild disk bulges at T4-5 and T8-9, (3) a small broad-based disk bulge at L4-5 with moderate canal stenosis, and (4) retrolisthesis at L5-S1 secondary to facet hypertrophy. EX 6 at 87-89; CX 14 at 29. On June 4, 1999, based on complaints of back and leg pain, the claimant underwent an ultrasound analysis which revealed a normal deep venous system. In June 1999, the claimant began a course of physical therapy that extended until February of 2000. EX 6 at 81-85.

While working as a bartender on July 10, 1999, the claimant tripped on a step as she was walking towards a freezer. CX 16 at 32. According to the claimant, she twisted her left ankle, fell onto outstretched hands on a cement floor, and may have also hit her head. CX 16 at 32, Tr. at 40. The claimant was taken by ambulance to the emergency room of Trippler Army Hospital. CX 11 at 21, CX 16 at 32. According to Dr. Peter Stull, x-rays of the claimant's left foot indicated "avulsion of the distal aspect of the medial malleolus" and "minimal soft tissue swelling." EX 6 at 78. In addition, Dr. Stull diagnosed a right hand contusion. EX 6 at 70. Initial treatment consisted of placing a posterior splint on the claimant's ankle and a follow-up appointment at an orthopedic clinic. CX 29 at 53. According to the claimant, both her hands were iced and x-rays were taken of her right

hand. Tr. at 51, 52. The emergency room records contain description of the claimant's left ankle and right hand complaints, but do not refer to a right hand x-ray or the use of ice on either of her hands. EX 6.

The claimant attended a follow-up appointment on July 13, 1999, when she was examined by Dr. Eric Smith. EX 6 at 76-77; CX 27 at 50. Dr. Smith diagnosed a grade III ankle sprain and placed her in a short-leg, non-weight-bearing cast. CX 27 at 50. Dr. Smith also prescribed the use of crutches for four weeks, followed by physical therapy and the use of a "cam walker," a type of flexible cast, for the subsequent four weeks. CX 27 at 50. At a later point, the claimant reported to Dr. Mathias Masem that this treatment included traction for her neck. CX 11 at 21.

On July 16, 1999, the claimant attended an additional follow-up appointment with Dr. Tracy Pinkston. CX 14 at 28. Dr. Pinkston noted that the claimant was using crutches and a wheelchair. CX 14 at 28. At this appointment, the claimant complained of increased pain in her back and right hand, prompting Dr. Pinkston to order additional x-rays. EX 6 at 73, CX 14 at 28. Dr. Lawrence T. Liu interpreted x-rays of her right hand as not revealing a recent fracture, but rather only a flexion in the proximal interphalangeal joint of the 5th finger most likely due to an old injury. EX 6 at 71, CX 14 at 28. Dr. Liu also found that x-rays of the claimant's back did not reveal any abnormalities. EX 6 at 69, 70, 72. Based on these interpretations, Dr. Pinkston prescribed additional pain medication and referred the claimant to a pain clinic. EX 6 at 75, CX 14 at 28. Upon attending the pain clinic later that day, the claimant was assessed as having chronic pain by Dr. Lynn Dahl. CX 14 at 28.

The claimant was next evaluated on August 13, 1999 by Dr. Spencer Chang. EX 6 at 67, CX 14 at 28. Dr. Chang recommended that the claimant use her cam walker for four weeks, gradually allowing the placement of weight on her left foot. CX 14 at 28.

By letter dated September 7, 1999, Dr. Pinkston reported that the claimant was continuing to use crutches and her cam walker. EX 6 at 63. Dr. Pinkston stated that the claimant was unable to work at the time and would be unable to work for two to three more months. EX 6 at 63. Dr. Pinkston also stated that the claimant was experiencing back pain "which has been aggravated by" the claimant's foot injury. EX 6 at 63.

On September 14, 1999 and October 12, 1999, x-rays were taken of the claimant's left ankle. CX 16 at 32. According to Dr. Salvador Cecilio, both x-rays revealed interval healing of the claimant's fracture. CX 16 at 32.

On September 17, 1999 and October 8, 1999, the claimant attended follow-up appointments with Dr. Dahl, who noted continued back and leg pain. EX 6 at 61, 65.

On October 12, 1999, the claimant was again examined by Dr. Chang, who recommended continued use of the cam walker, with increasing weight bearing on her left leg. EX 6 at 64, CX 29 at 53. Dr. Chang also diagnosed "possible RSD [reflex sympathetic dystrophy]." EX 6 at 64.

On October 17, 1999,the claimant arrived in the emergency room at Trippler Army Hospital, complaining of right-sided neck pain that radiated to her left shoulder and arm. EX 6 at 60. Dr. Stull examined the claimant and suspected radiculopathy. CX 14 at 28. He recommended rest and prescribed Noprosyn and Roxicet. CX 14 at 28.

On October 18, 1999, the claimant telephoned Dr. Dahl at the Trippler Army Medical Center Pain Clinic. CX 23 at 46. Since Dr. Dahl was unavailable to take the call, the claimant left a message explaining that she was experiencing pain in the left side of her neck, going down to her left arm. CX 23 at 46. The claimant also recounted her trip to the emergency room and stated that she had received injections to help her with her pain. CX 23 at 46.

On October 26, 1999, Dr. Stahl noted that the claimant should be referred for possible "RSD" of the left leg. CX 29 at 53. Upon consultation for possible RSD, on October 26, 1999, Dr. John Stang reviewed the claimant's medical records and noted the claimant's complaints of left upper extremity weakness, pain, and numbness as well as little toe and lateral foot numbness. CX 25 at 48.

On November 2, 1999, the claimant again went to the Trippler Army Medical Center Emergency Room with complaints of neck, right and left arm, left hand, and left finger pain. CX 24 at 47. The claimant was instructed to continue taking her medication and to return for a follow-up appointment in ten days. CX 24 at 47.

On November 8, 1999, Dr. Phyllis Barr diagnosed the claimant as having Type II diabetes and hypertension. CX 14 at 29. On November 11, 1999 and November 12, 1999, Dr. Barr performed additional examinations, at which time she noted that the claimant had complaints of a pinched nerve and numb fingertips in her left hand. CX 22 at 44, EX 6 at 58.

On November 23, 1999, Dr. Daniel Donovan examined the claimant. CX 28 at 51. Dr. Donovan noted the claimant's use of crutches and cam walker as well as her reports of left paracervical pain with radiation to the left arm and her three middle fingers. CX 28 at 51. Dr. Donovan determined that the motor examination was intact and noted an impression of no "radiculopathy or neuropathy," with pain being most likely "myofascial." CX 28 at 51. Dr. Donovan recommended further physical therapy. CX 14 at 28.

During a December 2, 1999 examination by Dr. Barr, the claimant complained of left ankle symptoms. CX 21 at 43. After conducting a physical examination, Dr. Barr made three assessments of the claimant's condition: (1) "[s]tatus post avulsion fracture in the medial malleolus with possible RSD," (2) "[d]ecreased range of motion, strength, and function of the left ankle," and (3) "[p]robable C7 radiculopathy." CX 21 at 43. Dr. Barr recommended additional physical therapy for the claimant's ankle problems, but doubted the benefits of any additional rehabilitation for the claimant's radiculopathy. CX 21 at 43.

On December 30, 1999, the claimant underwent a MRI scan of her cervical spine. CX 20 at 41. The scan revealed no abnormalities at C2-3, a mild central canal stenosis with a small diffuse disc

bulge at C3-4, small right paracentral disc protrusions at C4-5 and C5-6, a diffuse disc bulge at C6-7, and no abnormalities at C7-T1, a result identical to the scan performed on June 1, 1999. CX 20 at 41. A January 13, 2000 report by radiologist Leslie A. Bord included three impressions: (1) "right paracentral disc protrusions at C4-5 and C5-6, unchanged from the previous study," (2) "degenerative disc disease also involving C3-4 and C6-7, and (3) "borderline tonsillar ectopia." CX 20 at 41.

On January 5, 2000 and January 13, 2000, the claimant attended follow-up appointments with Dr. Dahl. CX 14 at 28, CX 29 at 53. Dr. Dahl noted the claimant's complaints of ankle pain and chronic spine pain. CX 14 at 28, CX 29 at 53. The claimant was also apparently seen on February 22, 2000 by a private podiatrist who recommended orthotics. CX 29 at 53.

On January 13, 2000, the employer controverted the claimant's right to continued disability benefits and terminated her disability payments effective January 8, 2000.[1] EX 8 at 19.

On January 27, 2000, neurosurgeon Eric P. Sipos examined the claimant. CX 14 at 29. Dr. Sipos noted that the December 30, 1999 MRI showed no change from a prior study and he recommended continued physical therapy. CX 14 at 29. Dr. Sipos also referred the claimant for another consultation with Dr. Stang. EX 6 at 80. Dr. Stang's consultation report, also dated January 27, 2000, indicated a provisional diagnosis of "[c]ervical spondylosis and "myofascial pain syndrome." EX 6 at 80.

On February 2, 2000, the claimant was examined by Dr. Barr. EX 6 at 51. Dr. Barr noted the claimant's MRI results and continued reports of pain. Observing "moderate improvement," Dr. Barr agreed with Dr. Donavan's assessment and plan, including continued physical therapy. EX 6 at 52.

On February 17, 2000, Dr. Dahl sent a letter to an unspecified party, stating that the claimant had "long established spine pain, which is most likely due to degenerative changes and will be problematic for the remainder of her life." EX 6 at 50.

On February 22, 2000, the claimant filed a claim for compensation. EX 6 at 5. On the claim form the claimant alleged that her July 10, 1999 accident had injured her left foot, head, shoulder, neck, left arm, and lower back. EX 8 at 5.

On February 23, 2000, at the request of the employer's insurance claims adjuster, Dr. Barr answered a series of questions regarding the claimant's condition. CX 19 at 40. Dr. Barr stated that the claimant was unable to work due to continued numbness in her left foot and neck and left hand discomfort. CX 19 at 40. Dr. Barr identified a fractured left ankle, head trauma, and exacerbation of neck pain as conditions specifically related to the claimant's July 10, 1999 accident. CX 19 at 40.

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[1] The employer filed a additional notices of controversion on April 11, 2000, November 6, 2000, September 28, 2001, January 24, 2002, and March 26, 2002. EX 8 at 6-11.

In addition, Dr. Barr described the claimant's low back pain as "stable," but characterized the claimant's neck pain as a problem that would "continue." CX 19 at 40. In response to specific questions regarding the dates of maximum medical improvement for the claimant's conditions, Dr. Barr answered that the claimant "requires weekly physical therapy and monthly appointments with the pain clinic," and that the claimant "will slowly improve over the next 6-12 months with therapy." CX 19 at 40. Dr. Barr also noted that the claimant was failing to control her diabetes. CX 19 at 40.

On March 8, 2000, Dr. Barr again examined the claimant who reported pain in her lower back, left foot, and left ankle, and neck. CX 14 at 28; CX 18 at 39.

On March 22, 2000, the claimant returned for an examination with Dr. Donovan, who noted the claimant's complaints of lower back and neck pain. At Dr. Donovan's request, on April 11, 2000, the claimant underwent nerve studies which revealed mild to moderate left carpal tunnel syndrome and no radiculopathy. CX 16 at 32, EX 6 at 42.

On April 24, 2000, orthopedic surgeon Salvador Cecilio examined the claimant. CX 16 at 32. In addition to performing a physical examination, Dr. Cecilio reviewed the claimant's medical records, diagnostic tests, and medical history. CX 16 at 32. Dr. Cecilio noted the following impressions: (1) "avulsion fracture medial malleolus, healed; torn deltoid ligament, inadequately healed, left ankle," (2) "[l]eft carpal syndrome, moderately symptomatic," and (3) "[s]prain cervical and lumbroscaral spines, with symptomatic aggravation of pre-existing spinal stenosis." CX 16 at 35. Dr. Cecilio opined that the neck injury was a sprain which caused a "symptomatic exacerbation" of the claimant's pre-existing stenosis, but noted that there was no evidence of permanent aggravation. CX 16 at 35. At the same time, however, Dr. Cecilo stated that the claimant's cervical and lumbar problems were "unrelated to the subject work injury." CX 16 at 35. In addition, Dr. Cecilio concluded that the claimant's left side carpal tunnel syndrome was "probably caused directly or indirectly by the contusion/sprain of the left wrist/hand." CX 16 at 35.

On that same day, Dr. Cecilio issued an interim report to the employer's insurer. CX 16 at 36. In the report, Dr. Cecilio stated that the claimant remained concerned about her ankle injury, carpal tunnel syndrome, and back problems. CX 16 at 36. Dr. Cecilio recommended three treatment options: (1) carpal tunnel release for the left wrist, (2) exploration, debridement and repair of her left ankle's deltoid ligament, and (3) a possible left ankle arthroscopy. CX 16 at 36.

On May 10, 2000, board certified orthopedic surgeon Jeffery Lee examined the claimant. CX 14 at 27. Based on a physical examination, a review of the claimant's medical records and history, the claimant's description of her symptoms, and x-rays performed that day, Dr. Lee prepared a report dated May 12, 2000. CX 14 at 27. Dr. Lee made several findings: (1) the claimant's right wrist sprain and left ankle injury were "causally related" to her July 10, 1999 work injury, (2) the injury exacerbated a pre-existing neck and low back pain with underlying cervical and lumbar disk degeneration and bulges, and (3) as of December 2, 1999, the claimant's left ankle condition had "reached maximal medical improvement." CX 14 at 30. In this regard, Dr. Lee commented that while further treatment might further alleviate her foot and ankle pain, it would not restore any

function. CX 14 at 30. Dr. Lee was unable to determine whether the claimant was able to return to work and believed that a formal functional capacity evaluation would be helpful in determining her work restrictions. CX 14 at 30. Based on a dorsiflexion of 10 degrees, Dr. Lee gave to the claimant a disability rating of "3% whole person/7% lower extremity." EX 4 at 38.

On May 19, 2000, Dr. Cecilio prepared an interim report on the claimant's condition. CX 15 at 31. Dr. Cecilio noted the claimant's complaints of left hand paraesthesias, numbness, and disfunction, and attributed these symptoms to "unresolved carpal tunnel syndrome." CX 15 at 31. Dr. Cecilio recommended left carpal tunnel release surgery as well as surgery to repair the claimant's torn ankle deltoid ligament. CX 15 at 31.

During the summer of 2000, the Claimant moved from Hawaii to Oakland, California. CX 11 at 21.

On September 14, 2000, Dr. Bill Longwell examined the claimant. CX 12 at 24. Dr. Longwell noted the claimant's reports of left arm, shoulder, neck, and wrist pain. CX 12 at 24. He determined that the claimant was unable to return to work and referred the claimant to an orthopedist for a follow-up evaluation. CX 12 at 24.

On October 19, 2000, the claimant was examined by Dr. J. Marriott.[2] CX 13 at 25. Dr. Marriott recorded the claimant's reports of lower back and left leg pain and noted that the claimant was unable to sit or stand up straight. CX 13 at 25. Dr. Marriott described the claimant's current diagnosis as being sciatia with lower back pain "in conjunction" with her previous work injury. CX 13 at 25. The claimant was prescribed several medications and referred to an orthopedic specialist. CX 13 at 25. Dr. Marriott found that the claimant was unable to return to work. CX 13 at 25.

On December 22, 2000, Dr. Jack H. Stehr, an orthopedic surgeon, examined the claimant. EX 5 at 29. Dr. Stehr noted a negative Tinel sign for both wrists, a slightly diminished sensation to a pin prick of her left thumb and right index and middle fingers, and full flexion of her fingers. EX 5 at 39-40. Based on the claimant's history, a physical examination, and a review of medical records, Dr. Stehr "doubt[ed] that [the claimant had] significant carpal tunnel syndrome" and recommended conservative management for pain of her upper extremity, back, and neck. EX 5 at 40. Dr. Stehr stated in his report that physical therapy was ordered for four weeks. EX 5 at 40.

On January 10, 2001, the claimant was evaluated at the request of the employer by board certified orthopedic surgeon Ernest B. Miller. EX 1 at 1, EX 2 at 15. Based on a physical examination, a review of medical records, and medical and employment histories, Dr. Miller issued a January 26, 2001 report listing the following diagnosis: (1) "left ankle sprain, resolved," (2) "right

[2] The record contains two photocopies of a progress note dated October 18, 2000. On the second copy, however, the date is crossed out and replaced with the date "October 19, 2000" and contains the initials "JM." The progress report is therefore considered to have been originally misdated and in reference to an October 19, 2000 examination.

wrist sprain . . . resolved," (3) "history of chronic neck and low back symptoms and conditions (C4-5 and C5-6 herniated nucleus pulposus and spinal stenosis, mild disc bulges at T4-5 & T8-9, and herniated nucleus pulposus at L4-5 with stenosis), pre-existing the industrial injury of July 10, 1999 and not aggravated or exacerbated by such," and (4) "evidence of exaggerated symptoms and complaints, inconsistent with physical examination findings and laboratory/diagnostic testing results." EX 2 at 15. Dr. Miller did not review any medical records relating to the claimant's pain management program, assuming incorrectly that these records related to treatment prior to July 10, 1999 accident. EX 2 at 16. Dr. Miller also concluded that the claimant had "significant emotional problems with exaggerated symptoms" with respect to her perceived spinal problems and her upper extremity problems. EX 2 at 16. According to Dr. Miller's report, during his examination of the claimant she reported pain in her upper extremities and her left foot, but at other times while she was in his office she was able to demonstrate full and unrestricted, and apparently pain free, range of motion of her neck, shoulders, and upper extremities. EX 2 at 10-11. Dr. Miller found that, based on a review of objective findings in the medical records, the date of maximum medical improvement for the claimant's ankle injury was "around the end of the year 1999." EX 2 at 18. In arriving at this conclusion, Dr. Miller reasoned that no medical treatment was indicated beyond that point because her ankle injury was resolved. EX 2 at 18. Dr. Miller felt that no work restrictions were applicable and that the claimant could return to her regular employment as a bartender. EX 2 at 18.

With regard to the effect of pre-existing disabilities on her current condition, Dr. Miller gave the following opinion:

> As Ms. Stewart is not felt to have sustained any permanent impairment, the issues of apportionment . . . do not apply. Should Ms. Stewart ever be found to have any permanent impairment (although I see none involving any body part), 100% of this would be attributable to pre-existing factors . . . . [T]here has been no disability sustained as a result [of] the July 10, 1999 industrial injury.

EX 2 at 19.

On February 26, 2001, the claimant began receiving treatment from board certified orthopedic surgeon Dr. Mathias Masem . CX 11 at 21. Upon examination, Dr. Masem noted the claimant's reports of hand, thumb, and neck pain. The examination further revealed positive provocative tests for carpal tunnel syndrome, marked tenderness in the claimant's thumb, and a full range of hand motion. CX 11 at 22. The claimant's x-rays revealed normal carpal height and alignment, remarkable degenerative changes in the carpometacarpal joint of the thumb, and well maintained disk spaces of the cervical spine. CX 11 at 22. Dr. Masem noted the following impression: (1) bilateral carpal tunnel syndrome, (2) bilateral thumb carpometacarpal joint arthritis, and (3) cervical strain. CX 11 at 22. Dr. Masem concluded that the claimant appeared to have "clinically very significant carpal tunnel syndrome," and that surgery might be necessary after performing further electrodiagnostic tests. CX 11 at 22. Dr. Masem also concluded that the claimant had "remarkable thumb carpometacarpal joint arthritis" and that she might also benefit from surgery on her thumb. CX 11 at 23. In regards to employment, Dr. Masem opined that the claimant was precluded from "any

forceful or repetitive manual activities until further evaluation and treatment." CX 11 at 23. Dr. Masem issued a progress report on March 22, 2001 listing a diagnosis of repetitive stress injury and recommending physical therapy. EX 2 at 24.

On March 31, 2001, Dr. Gerald P. Keane performed an electrodiagnostic examination. CX 10 at 19. The nerve conduction velocity studies revealed "[s]evere right and mild-to-moderate left slowing of the median conductions bilaterally through the carpal tunnels." CX 10 at 19; EX 2 at 25.

On April 12, 2001, based on a diagnosis of bilateral carpal tunnel syndrome and bilateral thumb arthritis, the claimant began a six week physical therapy program which included a biofeedback evaluation. EX 2 at 25.

On April 17, 2001, as part of her physical therapy program, the claimant underwent a hand therapy evaluation by Kathleen R. Parker, MS, OTR. CX 9 at 15. Ms. Parker noted hand, wrist, and neck pain as well as reduced finger flexibility. CX 9 at 16. In addition, Ms. Parker indicated positive results on a number of nerve compression tests. CX 9 at 16. Ms. Parker also opined that the claimant suffered from "bilateral carpal tunnel syndrome, bilateral thumb arthritis, and cervical strain." CX 9 at 15. Ms. Parker further suggested that the claimant's conditions could be improved through the use of bilateral wrist and thumb splints and additional therapy. CX 9 at 18.

On April 24, 2001, Dr. Masem again examined the claimant. CX 8 at 14. Dr. Masem noted the claimant's complaints of bilateral hand and wrist pain, neck pain, and bilateral paresthesias. CX 8 at 14. In addition, Dr. Masem reviewed a series of nerve conduction studies which he found revealed "severe conduction delays on the right and moderate conduction delays on the left." CX 8 at 14. Dr. Masem also noted "remarkably positive Tinel's sign over the median nerve at the wrist bilaterally" as well as "marked thumb carpometacarpal joint tenderness." CX 8 at 14. Dr. Masem determined that the claimant's hand and wrist condition appeared to be refractory to conservative treatment with persistent and very remarkable symptoms. CX 8 at 14. Upon considering the claimant's thumb symptoms and degenerative changes in her thumb joints, Dr. Masem also recommended thumb joint surgery. CX 8 at 14.

On June 12, 2001, Dr. Masem wrote a letter to the employer's claims manager for this case. CX 7 at 12. Dr. Masem recounted the claimant's reports of carpal tunnel symptoms approximately one month after her fall in Hawaii. CX 7 at 12. Dr. Masem opined that carpal tunnel symptoms are consistent with swelling and secondary changes which can occur following a fall. CX 7 at 12. Dr. Masem added that he did not believe that the claimant would reach "maximum medical improvement" until she received surgery for both carpal tunnel syndrome and for bilateral carpometacarpal joint arthritis. CX 7 at 13.

On July 6, 2001, Dr. Masem again examined the claimant and noted her complaints of hand pain. CX 6 at 11. On August 20, 2001, Dr. Masem performed an additional examination, and based on the claimant's complaint's of pain, and several objective findings, diagnosed "[c]hronic refractory bilateral carpal tunnel syndrome, as well as bilateral thumb carpometacarpal joint arthritis. CX 5 at

9. Dr. Masem recommended surgery and that the claimant discontinue working for six weeks prior to surgery. CX 5 at 9,10.

On July 27, 2001, at the request of the employer, Dr. Miller reviewed his original report and issued a second report. EX 2 at 21. The basis for this review was apparently to give Dr. Miller an opportunity to reconsider his failure to find that the claimant had fractured her left ankle, and to allow him to review additional medical records. EX 2 at 23-24. Specifically, Dr. Miller reviewed the December 29, 2000 report of Dr. Stehr, the February 26, 2001 hand surgery consultation report of Dr. Masem, the March 22, 2001 report of Dr. Masem, the March 31, 2001 electrodiagnostic reports, and several physical therapy reports. EX 2 at 24-25. In his second report, Dr. Miller reiterated his opinion that "[o]ther than for the left ankle and right hand, there has been no injury sustained in this case, related to the July 10, 1999 event." EX 2 at 25. Dr. Miller further opined that all of the claimant's injuries were pre-existing and were not aggravated by the July 1999 accident. EX 2 at 25. Although Dr. Miller acknowledged that the electrodiagnostic tests indicated that carpal tunnel surgery was required and that the claimant's condition was worsening with time, Dr. Miller opined that carpal tunnel syndrome was not related to her July 10, 1999 work accident, but rather was due to "off-work activity" or her diabetic condition. EX 2 at 27. Dr. Miller reasoned that the "mechanism of injury on July 10, 1999 is not consistent with the diagnosis of bilateral carpal tunnel syndrome." EX 2 at 27. Dr. Miller did not address the possibility that the claimant's use of crutches might have caused or aggravated the claimant's carpal tunnel syndrome. EX 2 at 27. Dr. Miller also opined that the claimant could be expected to return to work approximately 12 weeks following carpal tunnel release surgery. EX 2 at 27. Dr. Miller also reiterated his opinion "that there was no evidence of a fracture of the left ankle, only a moderate sprain with some calcification of the deltoid ligament." EX 2 at 27. Dr. Miller argued that this failed to meet the formal definition of an avulsion fracture, which he described as being "a separation of a small fragment of bone cortex at the site of attachment of a ligament or tendon." EX 2 at 27. Even if there had been a fracture, Dr. Miller then argued, "this would not conform to any rating according to the Guides to the Evaluation of Permanent Impairment . . ." EX 2 at 27.

On August 23, 2001, Dr. Masem asked the employer for authorization to perform carpal tunnel decompression surgery on the claimant's right arm. On September 10, 2001, Dr. Masem again examined the claimant. CX 2 at 6. While most of the hand-written progress report is illegible, Dr. Masem did check boxes on a form to indicate that he recommended continuation of a home physical therapy program and that he was unable to determine the claimant's permanent disability status at that time. CX 2 at 6. Thereafter, the claimant temporarily stopped receiving treatment from Dr. Masem. Tr. at 45-46.

On August 29, 2001, the claimant went to the emergency room at Summit Hospital and was examined by a Dr. Davis. CX 3 at 7. The nurse's chart notes indicate that the claimant complained of bilateral wrist and arm pain. CX 3 at 7.

On December 3, 2001, the claimant began receiving treatment for her hands from Dr. Kendrick E. Lee, an orthopedic surgeon. CX 1 at 1-5. The claimant reported to Dr. Lee a right little

finger childhood injury that resulted in a permanent loss of extension. CX 1 at 2. Dr. Lee also considered the claimant's reported medical history, the June 12, 2001 report of Dr. Masem, the March 31, 2001 nerve conduction study of Dr. Keane, the August 20, 2001 notes of Dr. Masem, and apparently some x-rays.[3] CX 1 at 2-4. During the examination, the claimant reported daily numbness, pain, and decreased mobility in both hands. CX 1 at 2. After performing a physical examination, Dr. Lee diagnosed the following: (1) bilateral carpal tunnel syndrome, (2) right de Quervain's tenosynovitis; (3) bilateral early thumb CMC osteoarthritis. CX 1 at 3. Dr. Lee concluded that the claimant remained disabled and was "markedly symptomatic for her bilateral hand pain, right worse than left. CX 1 at 3. Dr. Lee recommended that the claimant proceed with a right carpal tunnel release and right de Quervain's release surgeries. CX 1 at 3. Dr. Lee did not, however, recommend right thumb CMC osteoarthritis surgery. CX 1 at 4. Dr. Lee offered the following opinion regarding the cause of the claimant's condition:

> Given the time course, the need for crutch use as a result of her foot fracture from the July 10, 1999, injury, I think it more likely than not that the patient's bilateral hand complaints, including the carpal tunnel syndrome, the de Quervain's, and the thumb CMC osteoarthritis were substantially caused and/or aggravated by the industrial injury of July 10, 1999. She tells me today she landed on both hands. In addition, there was a period of crutch use required by her left foot injury.

CX 1 at 4. On March 20, 2002, Dr. Lee performed carpal tunnel release surgery on the claimant's right wrist. CX 30 at 23, Tr. at 13. At some point after this surgery, the claimant returned to Dr. Masem for treatment of her hand conditions. CX 30 at 23-24.

At the request of claimant's counsel, on September 9, 2002, board certified foot surgeon Dr. Jay K. Benard evaluated the claimant's left ankle injury. On September 15, 2002, Dr. Benard prepared a report based on a physical examination and a review of the claimant's medical records and x-rays. CX 29 at 52. Dr. Benard diagnosed "[s]tatus post left ankle sprain with avulsion fracture, left medial malleolus." CX 29 at 56. In addition, Dr. Benard opined that the claimant had improved "somewhat since her evaluation was performed in May, 2000 by Dr. Lee" and that while her subjective complaints persisted, "the objective findings show that she has improved with regards to her range of motion and gait." CX 29 at 56. Dr. Benard recommended follow-up palliative treatment, including anti-inflammatory medication. Dr. Benard determined that the claimant's left foot injury reached a point of maximum medical improvement on January 10, 2001, the date of her examination by Dr. Miller. CX 29 at 56. Dr. Benard also agreed with Dr. Miller that the claimant's ankle problems had "resolved without residual disability," that her ankle had "returned to a full range of motion with no neuromuscular deficits and no deformities," and that her injury did not result in any impairment under the Guides to Evaluation of Permanent Impairment. CX 29 at 56. In this regard, Dr. Benard also stated that "if this was a situation involving her ankle only she would be able to

[3] In his report, Dr. Lee noted that x-rays were "under a separate cover." No discussion of x-ray results, however, was included anywhere else in his report. CX 1 at 3.

return to work with some restrictions including preclusion to prolonged standing and walking based on her subjective complaints." CX 29 at 56.

The claimant has not worked since the July 10, 1999 accident. Tr. at 44. On September 10, 2002, at the request of the employer, the claimant met with vocational rehabilitation specialist Michael Haag. EX 11 at 1. Among his other qualifications, Dr. Haag holds a doctorate degree in psychology and is a member of the California Association of Rehabilitation & Employment Professionals. EX 12 at 1.

On September 17, 2002, the claimant failed to attend a follow up appointment with Dr. Haag aimed at testing her job skills. Tr. at 61-62. Dr. Haag testified that the claimant left a message, after the date of her appointment, stating that she did not attend the appointment because she had applied for several of the jobs in his report. Tr. at 70. The claimant testified at trial that she thought that her appointment date was going to be changed and when she learned that she had missed her appointment she intended to reschedule the appointment. Tr. at 94-95.

On September 20, 2002, Dr. Haag prepared a vocational evaluation report. EX 11 at 1. Dr. Haag outlined several positions that he thought would be suitable employment for the claimant given his understanding of her medical restrictions, age, experience, and skills. EX 11 at 5.

On November 13, 2002, the parties took a post-trial deposition from Dr. Miller. EX 14. Dr. Miller apparently produced a third report on the claimant on November 8, 2002. EX 14 at 8. Although this report was not admitted into the record, Dr. Miller partly relied on this report in giving his deposition testimony. EX 14 at 6. Dr. Miller testified that the opinion expressed in his third report was consistent with his opinion in the first two reports. EX 14 at 8. Dr. Miller continued to classify the claimant's ankle injury as "a sprain," though admitting that a small piece of loose bone might be present in the claimant's ankle. EX 14 at 9. Dr. Miller opined that maximum medical improvement for the ankle occurred six months after the accident. EX 14 at 12. Dr. Miller testified that the claimant would have been temporarily and totally disabled due to her right hand injury for one to two weeks. EX 14 at 14. However, Dr. Miller also reiterated his opinion that the claimant's carpal tunnel syndrome did not result from her July 10, 1999 work injury. EX 14 at 15-58.

On the same day as Dr. Miller's deposition, the parties also took a post-trial deposition from Dr. Masem. CX 30. Dr. Masem recommended left-carpal tunnel surgery and then bilateral carpal-metacarpal surgery. CX 30 at 25. Dr. Masem diagnosed a strain and trapezius spasm, based on his clinical examination, and opined that the x-rays and MRIs did not impact on this diagnosis. CX 30 at 35. Dr. Masem opined that the results of his examinations have been consistent with the claimant's injury. CX 30 at 36. Dr. Masem stated that a cervical strain is "quite consistent with a fall or sustained use of crutches." CX 30 at 36. Dr. Masem also opined that it is probable that the fall and use of crutches strained the claimant's neck, "whether or not she had a neck problem before [the accident]." CX 30 at 39.

During the trial, the claimant testified that her left ankle will swell when she wears high-heeled shoes and is painful after standing for more than an hour. Tr. at 44. She also testified that her hands swell while writing or paying her bills. Tr. at 46-47. The claimant described the heaviest weight she can lift as being a coffee pot and asserted that she can hold such a weight for no more than five minutes. Tr. at 47. The claimant testified that the symptoms in her left hand are "a little" worse than the symptoms in her right hand. Tr. at 48. Her neck is painful, the claimant testified, when she drives, has her hair done, and after she lies in certain positions. Tr. at 48-49.

ANALYSIS

The employer and the claimant have stipulated: (1) that all the alleged injuries occurred at a time when the claimant was employed by a non-appropriated fund instrumentality, (2) that the claimant's average weekly wage for all the alleged injuries is $129.49, (3) that the claimant sustained a work-related injury to her left ankle on July 10, 1999, (4) that the claimant sustained a work-related contusion to her right hand on July 10, 1999, and (5) that the claimant was temporarily totally disabled through at least December 31, 1999.

There are disputes between the parties concerning the following issues: (1) the date of maximum medical improvement for the left ankle injury, (2) the extent of any permanent disability in the claimant's left ankle, (3) the existence of a causal relationship between the claimant's work injury and her right side carpal tunnel syndrome, (4) the date the claimant's right carpal tunnel injury reached the point of maximum medical improvement, (5) the existence of a causal relationship between the claimant's work injury and her left side carpal tunnel syndrome, (6) the date the claimant's left carpal tunnel injury reached the point of maximum medical improvement, (7) the claimant's entitlement to left carpal tunnel surgery**,** (8) the occurrence of any injury to the claimant's neck and cervical spine arising out of and in the course of her employment, (9) the date of maximum medical improvement for any work-related neck or cervical spine injury, (10) the extent of the claimant's entitlement to disability benefits, and (11) the employer's entitlement to Special Fund relief under the provisions of subsection 8(f) of the Act.

1. Date of Maximum Medical Improvement for the Left Ankle Injury

A disability is considered permanent as of the date a claimant's condition reaches the point of maximum medical improvement or if the condition has continued for a lengthy period of time and appears to be of lasting or indefinite duration. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 781-82 (1st Cir. 1979); *Crum v. General Adjustment Bureau*, 738 F.2d 474, 480 (D.C. Cir. 1984); *Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233 (1988). The issue of whether a claimant's condition has reached the point of maximum medical improvement is primarily a question of fact and must be resolved on the basis of medical rather than economic evidence. *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988); *Dixon v. John J. McMullen and Associates, Inc.*, 19 BRBS 243 (1986); *Trask v.*

Lockheed Shipbuilding and Construction Co., 17 BRBS 56 (1985). The mere possibility that a claimant's condition may improve in the future does not by itself support a finding that a claimant has not yet reached the point of maximum medical improvement. *Brown v. Bethlehem Steel Corp.*, 19 BRBS 200 (1987). However, a condition is not permanent as long as a worker is undergoing treatment that is reasonably calculated to improve the worker's condition even if the treatment may ultimately be unsuccessful. *Abbott v. Louisiana Insurance Guaranty Ass'n*, 27 BRBS 192, 200 (1993), *aff'd sub. nom Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122, 126 (5th Cir. 1994).

To support the contention that her left ankle injury did not reach the point of maximum medical improvement until September 9, 2002, the claimant apparently relies on her own testimony and the reports of Dr. Benard and Dr. Barr. *See* Tr. 36-58 (claimant's trial testimony), CX 29 at 52-56 (September 15, 2002 report of Dr. Benard), and CX 19 (February 23, 2000 report of Dr. Barr). In contrast, the employer contends that the claimant's left ankle condition became permanent and stationary on January 1, 2000. This contention is supported by the reports and testimony of Dr. Miller and the report of Dr. Jeffrey Lee. *See* EX 2 at 2-29 (January 26, 2001 report of Dr. Miller and July 27, 2002 report of Dr. Miller), EX 14 (November 13, 2002 deposition testimony of Dr. Miller), and EX 4 at 34-38 (May 12, 2000 report of Dr. Jeffrey Lee).

After considering the foregoing opinions, I conclude that the claimant's left ankle condition reached the point of maximum medical improvement on January 10, 2001. There are three reasons for this conclusion.

First, although Dr. Jeffrey Lee did issue a permanent disability rating for the claimant's ankle injury on December 2, 1999, the weight of the medical evidence supports a finding that the claimant's left ankle continued to heal after that date. For example, on February 23, 2000, Dr. Barr opined that the claimant would "slowly improve over the next 6-12 months with therapy." CX 19 at 40. Likewise, on April 24, 2000, Dr. Cecilio noted that the claimant's left ankle had "inadequately healed" and on May 19, 2000 he recommended surgery to repair the claimant's torn left ankle deltoid ligament. Similarly, on January 9, 2002, Dr. Benard opined that the claimant had improved "somewhat since her evaluation was performed in May, 2000 by Dr. Lee" and that while her subjective complaints persisted, "the objective findings show that she has improved with regards to her range of motion and gait." CX 29 at 56.

Second, Dr. Miller's opinion that the claimant's ankle injury reached maximum medical improvement at the end of 1999 in unconvincing. Dr. Miller's opinion was unspecific to any particular date and did not address medical records from the year 2000 indicating that the claimant's condition was improving. Moreover, in his first report, Dr. Miller also failed to acknowledge that the claimant had even fractured her left ankle, an omission that is contrary to the weight of the medical evidence, and directly contradicted by the opinions of all of the claimant's treating doctors.

Third, Dr. Benard, who has opined that the claimant's ankle injury reached maximum medical improvement on January 10, 2001, has presented the better reasoned opinion on this issue and is the

only board certified foot surgeon to offer an opinion in this case. CX 29 at 56. Moreover, Dr. Benard's opinion is consistent with Dr. Barr's February 23, 2000 prediction that the claimant's ankle "will slowly improve over the next 6-12 months with therapy." CX 19 at 40.

2. The Extent of Any Permanent Disability in the Claimant's Left Ankle

Under the provisions of subsections 8(c)(4) and 8(c)(19) of the Act, a worker who suffers the permanent partial loss of use of a foot is entitled to that portion of 205 weeks compensation which is equal to the percentage of the use of the worker's foot that has been lost, even if there is no proof of an actual loss of wage earning capacity. *See Henry v. George Hyman Construction Co.*, 749 F.2d 65 (D.C. Cir. 1984). Conversely, the amount of an injured worker's compensation is limited to the amount specified in subsection 8(c) and may not be increased to reflect additional losses, such as pain or suffering. *Young v. Todd Pacific Shipyards Corporation*, 17 BRBS 201 (1985). Pain may be relevant, however, in determining the extent to which a claimant has lost the use of a particular body part. *See Amato v. Pittson Stevedoring Corp.*, 6 BRBS 537 (1977). In determining the extent of loss of use of a body part, an administrative law judge may rely on the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (hereinafter the "AMA Guides"), but is not required to use those guidelines, except in cases involving hearing losses under subsection 8(c)(13) and occupational diseases covered under the provisions of subsection 8(c)(23). *Ortega v. Bethlehem Steel Corporation*, 7 BRBS 639 (1978). Payment of scheduled disability awards should ordinarily commence on the date the claimant's condition reaches the point of maximum medical improvement. *Turney v. Bethlehem Steel Corporation*, 17 BRBS 232, 235 (1985).

The claimant's assertion that she has permanently lost seven percent of the use of her left leg due to her ankle injury is based on the claimant's own testimony and on the report of Dr. Jeffrey Lee. *See* Tr. 36-58 (claimant's trial testimony), EX 4 at 34-38 (May 12, 2000 report of Dr. Jeffrey Lee). In contrast, the employer contends that the claimant has not lost any use of her left leg. The employer's contention is based on the reports and testimony of Dr. Miller and the report of Dr. Benard. *See* EX 2 at 2-29 (January 26, 2001 report of Dr. Miller and July 27, 2002 report of Dr. Miller), EX 14 (November 13, 2002 deposition testimony of Dr. Miller), and CX 29 at 52-56 (September 15, 2002 report of Dr. Benard).

I find that the weight of the evidence indicates that the claimant has no permanent left ankle disability. Although Dr. Jeffrey Lee's did report a seven percent left leg impairment based on dorsiflexion measurement during a December 2, 1999 examination, Dr. Benard's January 9, 2002 examination of the claimant indicates that the claimant's subsequent left ankle treatment was so successful that her left ankle had "returned to a full range of motion" CX 29 at 56. While Dr. Miller's opinion is less convincing, he also found during a January 10, 2001 examination that the claimant had a full range of motion in her left ankle and that she did not suffer any pain upon movement.

3. Existence of a Causal Relationship between the Claimant's Work Injury and her Right Side Carpal Tunnel Syndrome

The claimant contends that her July 10, 1999 work injury caused her to develop carpal tunnel syndrome in her right wrist. In contrast, the employer contends that the work injury caused only a contusion.

Insofar as the claimant contends that she suffered work-related injuries to her right hand, she is aided by the provisions of subsection 20(a) of the Longshore Act, which provides that in proceedings to enforce a claim under the Act, "it shall be presumed, in the absence of substantial evidence to the contrary---(a) that the claim comes within the provisions of the Act...." In order to use this presumption to show a causal relationship between a claimant's job and his or her impairment, a claimant must produce evidence indicating that he or she suffered some harm or pain *and* that working conditions existed or an accident occurred that could have caused the harm or pain. *See Kelaita v. Triple A Machine Shop,* 13 BRBS 326 (1981). Thus, the presumption cannot be invoked if a claimant shows only that he or she suffers from some type of impairment. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP,* 455 U.S. 608 (1982). However, only "*some* evidence tending to establish" both prerequisites is required and it is not necessary to prove such prerequisites by a preponderance of the evidence. *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 296 n.6 (D.C. Cir. 1990)(emphasis in original). Once the subsection 20(a) presumption has been properly invoked, the relevant employer is given the burden of presenting "substantial evidence" to counter the presumed relationship between the claimant's impairment and its alleged cause.[4] If the presumption is rebutted, it falls out of the case and the administrative law judge must

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5. *Dower v. General Dynamics Corp.*, 14 BRBS 324 (1981). There is one court of appeals decision that appears to hold that medical testimony offered to rebut a subsection 20(a) presumption of causation is not sufficient to satisfy the requirements of the Act unless that testimony completely "rules out" any possible causal connection between a claimant's employment and the alleged disability. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 297 (11th Cir. 1990) (holding that the subsection 20(a) presumption was not rebutted because no physician had offered an opinion "ruling out a potential connection" between the claimant's medical condition and his employment). However, this standard has been applied only in the Eleventh Circuit and it has been explicitly rejected by both the First and Fifth Circuits. *Bath Iron Works v. Director, OWCP*, 109 F.3d 53, 56 (1st Cir. 1997)(holding that an "employer need not rule out any possible causal relationship between the claimant's employment and his condition" because such a requirement "would go far beyond the substantial evidence standard set forth in the statute"); *Conoco, Inc. v. Director, OWCP,* 194 F.3d 684, 690 (5th Cir. 1999)("unequivocally" rejecting a "'ruling out' standard" and noting that the text of subsection 20(a) requires only "substantial evidence" to rebut the presumption). Moreover, the Fourth and Seventh Circuits have implicitly rejected a "ruling out" standard by issuing decisions holding that all it takes to rebut a subsection 20(a) presumption is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *American Grain Trimmers, Inc. v. OWCP,* 181 F.3d 810, 817-18 (7th Cir. 1999); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 263 (4th Cir. 1997).

weigh all of the evidence and resolve the issue based on the record as a whole. *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982). Under the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994), the ultimate burden of proof then rests on the claimant. *See also Holmes v. Universal Maritime Services Corp.*, 29 BRBS 18, 21 (1995). If the presumption is not rebutted with substantial evidence, a causal relationship between the worker's job and his or her impairment must be presumed. However, the subsection 20(a) presumption does not assist claimants in proving that any disability resulting from a work injury was in fact permanent. *Holton v. Independent Stevedoring Co.*, 14 BRBS 441 (1981); *Duncan v. Bethlehem Steel Corp.*, 12 BRBS 112 (1979).

In considering medical evidence concerning a worker's injury, a treating physician's opinion is entitled to "special weight." *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998). In fact, in the Ninth Circuit clear and convincing reasons must be given for rejecting an *uncontroverted* opinion of a treating physician. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). However, the Ninth Circuit has also held that a treating physician's opinion is not necessarily conclusive and may in some circumstances be disregarded, even if uncontradicted. For example, an administrative law judge may reject a treating physician's opinion that is "brief and conclusionary in form with little in the way of clinical findings to support [its] conclusion." *Id.* In addition, an administrative law judge can reject the opinion of a treating physician which conflicts with the opinion of an examining physician if the ALJ's decision sets forth "'specific, legitimate reasons for doing so that are based on substantial evidence in the record.'" *Id.*

It is also noted that under the so-called "aggravation rule," a claimant seeking benefits under the Longshore Act does not have to show that a work injury was the sole cause or even the principal cause of a disability. Rather, a claimant need only show that an employment-related injury aggravated, accelerated, or combined with a pre-existing impairment. *Port of Portland v. Director,*

In this case, the claimant's alleged work injuries occurred in the Ninth Circuit, which has not yet considered the argument that subsection 20(a) requires an employer to provide evidence completely ruling out even a hypothetical possibility of a causal relationship. However, the Ninth Circuit's most recent decision concerning the application of subsection 20(a) suggests that if the issue were to be presented, this circuit would join with the First, Fourth, Fifth and Seventh Circuits in rejecting any such standard. In that decision, *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615 (9th Cir. 1999), the court did not in any way suggest that medical evidence that fails to completely "rule out" even the possibility of causation is in any way insufficient or equivocal. Rather, the court expressed agreement with the Benefits Review Board's observation that unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. Moreover, the BRB has recently held that medical opinions that are within a "reasonable degree of medical certainty" cannot be rejected as being "equivocal" just because such opinions do not "rule out" even the hypothetical possibility of a causal relationship. *O'Kelley v. Department of the Army/NAF*, 34 BRBS 39, 41-43 (2000).

OWCP, 932 F.2d 836, 839 (9th Cir. 1991). If a claimant is successful in making such a showing, his or her entire impairment is compensable. *Id.*

To support her contention that her July 10, 1999 injury caused her to develop carpal tunnel syndrome in her right wrist, the claimant apparently relies on her own testimony and on the testimony and reports of Dr. Masem, Dr. Kendrick Lee, and Dr.Cecilio. *See* Tr. 36-58 (claimant's trial testimony) CX 2 at 6 (September 10, 2001 report of Dr. Masem), CX 3 at 7 (August 29, 2001 report of Dr. Masem), CX 4 at 8 (August 23, 2001 report of Dr. Masem), CX 5 at 9-10 (August 20, 2001 report of Dr. Masem), CX 6 at11 (July 6, 2001 report of Dr. Masem), CX 7 at 12-13 (June 12, 2001 report of Dr. Masem), CX 8 at 14 (April 24, 2001 report of Dr. Masem), CX 11 at 21 (February 26, 2001 report of Dr. Masem), CX 30 at 1-61 (November 13, 2002 deposition testimony of Dr. Masem), CX 1 at 1-5 (December 3, 2001 report of Dr. Kendrick Lee), CX 15 at 31 (May 19, 2000 report of Dr. Cecilio), and CX 16 at 32-37 (April 24, 2000 report of Dr. Cecilio). In brief, this evidence indicates that the claimant fell on to her right hand during her July 10, 1999 accident and that such an event along with the claimant's subsequent use of crutches is likely to have caused her to have developed carpal tunnel syndrome in her right wrist. For example, Dr. Masem testified that the claimant's work-related fall on to her hands could have contributed to her right carpal syndrome by stretching or causing a contusion to the nerve, which could have been further aggravated by use of crutches. CX 30 at 14, 22-23, 41. Likewise, on December 3, 2001, Dr. Kendrick Lee opined that it is more likely than not that the claimant bilateral carpal tunnel syndrome was "substantially caused and/or aggravated" by the claimant's July 10, 1999 work injury. CX 1 at 4. This evidence is sufficient to warrant invocation of a subsection 20(a) presumption that the claimant suffered a work-related carpal tunnel syndrome injury to her right hand as a result of her July 10, 1999 injury.

The employer's contention that the claimant's July 10, 1999 injury did not cause any right carpal tunnel impairment is based on the testimony and reports of Dr. Miller. *See* EX 2 at 2-29 (January 26, 2001 report of Dr. Miller and July 27, 2002 report of Dr. Miller), and EX 14 (November 13, 2002 deposition testimony of Dr. Miller). According to the deposition testimony of Dr. Miller, the claimant's carpal tunnel syndrome did not result from her work accident. I find that this evidence is sufficient to rebut the subsection 20(a) presumption.

Because it has been determined that the presumption of causation has been rebutted, it is necessary to consider all of the relevant evidence to determine if a causal relationship between the claimant's right side carpal tunnel syndrome and her July 10, 1999 work injury has been established by a preponderance of the evidence. After so considering the evidence, I conclude that the weight of the evidence indicates that the claimant did suffer a work-related carpal tunnel syndrome injury to her right wrist as a result of her July 10, 1999 injury. There are three reasons for this conclusion.

First, there is no dispute that the claimant suffered from a right hand contusion during her July 10, 1999 fall at work. In fact, medical records show that when the claimant was treated at the emergency room of Trippler Army Hospital, the treating physician diagnosed a right hand contusion. Likewise, there is evidence that the claimant used crutches from July 10, 1999 to November 23, 1999.

Second, although the record contains no evidence suggesting that the claimant had carpal tunnel syndrome prior to July 10, 1999, almost all of the physicians who have subsequently treated or examined the claimant for her right arm complaints have concluded that the claimant has right sided carpal tunnel syndrome.

Third, although Dr. Miller has opined that the claimant's carpal tunnel syndrome is not related to her work injury, his opinion is less credible than the opinions of Dr. Masem and Dr. Kendrick Lee. In this regard, it is noted that although Dr. Masem is a board-certified specialist in hand surgery, Dr. Miller is not specifically certified as a hand surgeon. EX 14 at 40-41 (testimony of Dr. Miller). Rather, the bulk of Dr. Miller's time is devoted to providing evaluations and giving expert testimony on behalf of employers. EX 14 at 27-34, 36.

4. The Date the Claimant's Right Carpal Tunnel Injury Reached the Point of Maximum Medical Improvement

The claimant's contention that her right carpal tunnel injury has not reached the point of maximum medical improvement is based on the reports and testimony of Dr. Masem. *See* CX 2 at 6 (September 10, 2001 report of Dr. Masem), CX 3 at 7 (August 29, 2001 report of Dr. Masem), CX 4 at 8 (August 23, 2001 report of Dr. Masem), CX 5 at 9-10 (August 20, 2001 report of Dr. Masem), CX 6 at11 (July 6, 2001 report of Dr. Masem), CX 7 at 12-13 (June 12, 2001 report of Dr. Masem), CX 8 at 14 (April 24, 2001 report of Dr. Masem), CX 11 at 21 (February 26, 2001 report of Dr. Masem), and CX 30 at 1-61 (November 13, 2002 deposition testimony of Dr. Masem).

In contrast, the employer contends that even if the claimant suffered from work-related carpal tunnel syndrome, this condition resolved on April 24, 2000. This contention is supported by the report of Dr. Cecilio and arguably by Dr. Miller. *See* CX 15 at 31 (May 19, 2000 report of Dr. Cecilio), and CX 16 at 32-37 (April 24, 2000 report of Dr. Cecilio), EX 14 at 19 (testimony of Dr. Miller).

After considering the foregoing opinions, I conclude that the claimant's right carpal tunnel condition has not reached the point of maximum medical improvement. There are three reasons for this conclusion.

First, on the issue of carpal tunnel syndrome, the opinion of Dr. Masem is the most credible in this case. Dr. Masem is board certified in hand surgery, an assistant clinical professor in orthopedic surgery at the University of California San Francisco, and is the claimant's current treating physician. CX 30 at 4-5, CX 30 at 5-6. Moreover, he is the only board certified hand surgeon to offer an opinion in this case and has performed several thousand carpal tunnel surgeries. CX 30 at 8. In addition, the opinion of Dr. Masem is well-reasoned and is predicated on the most extensive examinations of the claimant's upper extremities. Dr. Masem opined that the claimant will not reach "maximum medical improvement" until she receives surgery for both carpal tunnel syndrome and for bilateral carpometacarpal joint arthritis. CX 7 at 13, CX 30 at 22.

Second, Dr. Cecilio has not in fact opined that the claimant's right carpal tunnel syndrome resolved by April 24, 2000. Although Dr. Cecilio's report of his April 24, 2000 examination of the claimant fails to list right side carpal tunnel syndrome as a diagnosis, this failure to diagnose the condition is not the same as finding that the condition had become permanent and stationary. Furthermore, any such a finding would be clearly outweighed by the unambiguous opinions of Dr. Masem and Dr. Kendrick Lee that the claimant continued to experience right carpal tunnel syndrome after April 24, 2000.

Third, although Dr. Miller has opined that the claimant's carpal tunnel syndrome would have resolved within six months after the claimant discontinued the use of crutches, that opinion is contradicted by the weight of the medical evidence which shows that the claimant suffered from ongoing carpal tunnel syndrome symptoms well beyond the six month period following her last use of crutches and that the symptoms -continued until the right carpal tunnel surgery performed by Dr. Kendrick Lee on March 20, 2002. Moreover, Dr. Miller's opinion is highly speculative, based entirely on how he would expect a typical patient to react rather than the actual medical progress of the claimant. The opinion of Dr. Masem, in contrast, is based on his extensive examinations of the claimant's right hand.

5. The Existence of a Causal Relationship between the Claimant's Work Injury and her Left Side Carpal Tunnel Syndrome

In addition to the claimant's allegation that she injured her right carpal tunnel during her July 10, 1999 accident, there is an allegation by the claimant that she also suffered a left carpal tunnel injury. In making this claim, the claimant is again aided by the provisions of subsection 20(a) of the Longshore Act. As grounds for invoking a subsection 20(a) presumption that she suffered a work-related left-hand impairment, the claimant relies on her own testimony that she landed on both of her hands during her July 10, 1999 accident. In addition, she also relies on the testimony and reports of Dr. Masem, Dr. Kendrick Lee, and Dr.Cecilio. *See* Tr. 36-58 (claimant's trial testimony), CX 2 at 6 (September 10, 2001 report of Dr. Masem), CX 3 at 7 (August 29, 2001 report of Dr. Masem), CX 4 at 8 (August 23, 2001 report of Dr. Masem), CX 5 at 9-10 (August 20, 2001 report of Dr. Masem), CX 6 at11 (July 6, 2001 report of Dr. Masem), CX 7 at 12-13 (June 12, 2001 report of Dr. Masem), CX 8 at 14 (April 24, 2001 report of Dr. Masem), CX 11 at 21 (February 26, 2001 report of Dr. Masem), CX 30 at 1-61 (November 13, 2002 deposition testimony of Dr. Masem), CX 1 at 1-5 (December 3, 2001 report of Dr. Kendrick Lee), CX 15 at 31 (May 19, 2000 report of Dr. Cecilio), and CX 16 at 32-37 (April 24, 2000 report of Dr. Cecilio). According to deposition testimony of Dr. Masem, the claimant's work-related fall onto her hands contributed to her left carpal syndrome by stretching or causing a contusion to the nerve, which could have been further aggravated by the use of crutches. I find that such evidence is sufficient to warrant invocation of a subsection 20(a) presumption that the claimant suffered a left carpal tunnel injury as a result of the July 10, 1999 accident.

The employer's contention that the claimant's July 10, 1999 injury did not cause any left carpal tunnel injury is based on the testimony and reports of Dr. Miller and the report of Dr. Stehr.

See EX 2 at 2-29 (January 26, 2001 report of Dr. Miller and July 27, 2002 report of Dr. Miller), EX 14 (November 13, 2002 deposition testimony of Dr. Miller), EX 5 at 39-40 (December 29, 2000 report of Dr. Stehr). According to the deposition testimony of Dr. Miller, the claimant's carpal tunnel syndrome did not result from her work accident. Likewise, Dr. Stehr opined that the claimant did not have "significant" left side carpal tunnel syndrome. I find that this evidence is sufficient to rebut the subsection 20(a) presumption.

Because it has been determined that the presumption of causation has been rebutted, it is necessary to consider all of the relevant evidence to determine if a causal relationship between the claimant's left carpal tunnel impairment and her July 10, 1999 work injury has been established by a preponderance of the evidence. After so considering the evidence, I conclude that a preponderance of the evidence indicates that the claimant did in fact suffer a work-related left carpal tunnel injury. There are five reasons for this conclusion.

First, the claimant probably suffered some trauma to her left hand during her July 10, 1999 accident. The claimant testified that her July 10, 1999 accident involved landing on both hands, and that both hands were x-rayed and treated with ice at the emergency room. While the emergency room reports do not contain a record of either the ice treatment or of x-rays being taken of both hands, the treating physician did note in the emergency room report that he diagnosed a right hand contusion. The claimant's testimony, along with the documented trauma to her right hand, supports a conclusion that the claimant landed on both hands during her July 10, 1999 accident.

Second, the medical evidence supports a finding that the claimant's crutch use, either alone or by aggravating the likely trauma to her left hand, caused the claimant's left carpal tunnel syndrome. As with the issue of the claimant's right hand carpal tunnel syndrome, Dr. Masem offered a detailed and well-reasoned opinion that the claimant's bilateral carpal tunnel syndrome was "at least aggravated by her use of crutches." CX 30 at 11.

Third, a finding that the claimant's use of crutches caused or aggravated her left hand carpal tunnel syndrome is supported by contemporaneous medical records showing that the claimant's left upper extremity symptoms were first reported while or shortly after she was using crutches. In particular, on October 17, 1999, the claimant arrived at the emergency room at Trippler Army Hospital complaining of pain originating at her neck and going down to her left arm, symptoms for which the claimant apparently received injections of pain medication. Likewise, on October 18, 1999, the claimant telephoned Dr. Dahl at the Trippler Army Medical Center Pain Clinic and complained of left arm pain. The claimant again went to the emergency room on November 2, 1999 complaining of, among other things, pain in her left hand and fingers. On November 8, 1999, the claimant reported to Dr. Barr complaints of a numb fingertips in her left hand. On November 23, 1999, the claimant reported to Dr. Donovan neck pain radiating down to her left arm and middle fingers.

Fourth, the claimant was diagnosed with left carpal tunnel syndrome within several months of use of crutches. In particular, on April 11, 2000 the claimant underwent nerve conduction studies which revealed mild to moderate left carpal tunnel syndrome. On April 24, 2000, Dr. Cecilio

diagnosed "[l]eft carpal tunnel syndrome, moderately symptomatic," and recommended left carpal tunnel release surgery. CX 16 at 35, CX 16 at 36.

Fifth, as discussed previously, the opinion of Dr. Masem on carpel tunnel issues is more credible than the opinion of the employer's expert, Dr. Miller. Among other things, Dr. Masem is the only board certified hand surgeon to offer an opinion in this case and is the claimant's current treating physician. Dr. Masem's opinion is also supported by the opinions of Dr. Cecilio, who concluded that the claimant's left side carpal tunnel syndrome was "probably caused directly or indirectly by the contusion/sprain of the left wrist/hand" and by Dr. Kendrick Lee, who also diagnosed bilateral carpal tunnel syndrome and opined that the claimant's condition was "substantially caused and/or aggravated by the industrial injury of July 10, 1999." CX 16 at 36 (Dr. Cecilio), CX 1 at 4 (Dr. Lee). In contrast, Dr. Miller is less qualified than Dr. Masem to offer opinions on carpal tunnel issues. Indeed, Dr. Miller's January 10, 2001 report even failed to recognize that the claimant had carpal tunnel syndrome. Although Dr. Miller later theorized that the claimant's carpal tunnel symptoms are due to "off-work activity" or her diabetic condition, Dr. Miller did not discuss in either of his two reports whether the claimant' carpal tunnel syndrome could have been caused or aggravated by the claimant's use of crutches. Nor did Dr. Miller credibly address this possibility in his deposition testimony.

6. The Date the Claimant's Left Carpal Tunnel Injury Reached the Point of Maximum Medical Improvement

The claimant contends that the injury she suffered to her left carpal tunnel on July 10, 1999 has not reached the point of maximum medical improvement. The primary support for this contention is Dr. Masem's deposition testimony that the claimant's left carpal tunnel condition has not resolved and requires surgical treatment. CX 30 at 25 (November 13, 2002 deposition testimony of Dr. Masem). *See also* CX 2 at 6 (September 10, 2001 report of Dr. Masem), CX 3 at 7 (August 29, 2001 report of Dr. Masem), CX 4 at 8 (August 23, 2001 report of Dr. Masem), CX 5 at 9-10 (August 20, 2001 report of Dr. Masem), CX 6 at11 (July 6, 2001 report of Dr. Masem), CX 7 at 12-13 (June 12, 2001 report of Dr. Masem), CX 8 at 14 (April 24, 2001 report of Dr. Masem), CX 11 at 21 (February 26, 2001 report of Dr. Masem). In contrast, the employer contends that if the claimant has suffered any work-related injury to her left hand the injury reached the point of maximum medical improvement in December of 1999. This contention is purportedly supported by the report of Dr. Stehr. Tr. at 17, EX 5 at 39-40 (December 29, 2000 report of Dr. Stehr).

After considering the foregoing opinions, I conclude that the claimant's left hand condition has not reached the point of maximum medical improvement. There are two reasons for this conclusion.

First, as previously discussed, Dr. Masem offers the most credible opinion on the issue of the claimant's left carpal tunnel condition. Dr. Masem opined that the claimant's bilateral carpal tunnel syndrome will not reach "maximummedical improvement" until she receives surgery for both carpal tunnel syndrome and for bilateral carpometacarpal joint arthritis. CX 7 at 13. The opinion of Dr.

Masem is supported by the opinion of Dr. Kendrick Lee who noted the claimant's continuing bilateral hand symptoms as of December 3, 2001.

Second, Dr. Stehr's opinion does not support a finding that the claimant reached maximum medical improvement in December of 1999**.** Although Dr. Stehr did opine in December of 2000 that he "doubt[ed] that [the claimant had] significant carpal tunnel syndrome," he did not offer any conclusion on whether the claimant's condition was permanent and stationary. Moreover, he recommended conservative management for pain of her upper extremity and he advised the claimant to undergo physical therapy for four weeks. Furthermore, even if Dr. Stehr's report could be construed as a expressing an opinion that the claimant's left carpal syndrome had become permanent and stationary, this opinion would be outweighed by the better reasoned opinions of Dr. Masem and Dr. Kendrick Lee that the claimant continued to experience left carpal tunnel syndrome after December 1999.

7. The Claimant's Entitlement to Surgery on her Left Carpal Tunnel and Carpal-Metacarpal Joints

Under section 7 of the Act an employer is required to furnish an injured employee such medical treatment as is reasonable and necessary. A claimant establishes a *prima facie* case that his or her medical care is compensable if the evidence shows that a licensed physician has indicated that the treatment is necessary for a work-related condition. *See Turner v. Chesapeake & Potomac Telephone Company*, 16 BRBS 255 (1984). If an employee's request for necessary treatment is denied or neglected by the employer, the employee is entitled to procure the treatment at the employer's expense. *See Atlantic & Gulf Stevedores, Inc. v. Neuman*, 440 F.2d 908 (5th Cir. 1971); *Roger's Terminal and Shipping Corp. v. Director, OWCP*, 784 F.2d 687 (5th Cir. 1986); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989). In addition, the Court of Appeals for the Ninth Circuit has held that "when an injured employee is faced with competing medical opinions about the best way to treat his work-related injury, each of them medically reasonable, it is for the patient, not the employer or the [administrative law judge] to decide what is best for him." *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998).

In this case, the claimant's treating physician is Dr. Masem, and he has opined that the claimant's work related injury warrants surgery for the treatment of her left carpal tunnel syndrome as well as surgery on both her carpal-metacarpal joints. CX 30 at 16-17, 22, 25, 44. Left carpal tunnel surgery has also been recommended by Dr. Cecelio. CX 16 at 36. The employer has failed to submit any convincing evidence that would indicate that these recommendations are unreasonable. Indeed, even Dr. Miller has conceded that carpal tunnel release surgery is medically appropriate. EX 2 at 27. Accordingly, it is concluded that the employer has failed to meet its burden under the *Amos* decision of establishing that the medical opinions upon which the claimant has chosen to rely are in fact medically unreasonable. The employer is therefore obligated to provide the surgeries recommended by Dr. Masem.

8. The Occurrence of any Injury to the Claimant's Neck and Cervical Spine Arising Out of and in the Course of her Employment

The claimant's contention that her July 10, 1999 injury accelerated or aggravated her neck impairment is based in part onthe claimant's own testimony that she began suffering increased neck pain following the July 10, 1999 injury. Tr. 36-58 (claimant's trial testimony). The claimant also relies on the testimony and reports of Dr. Masem, Dr. Barr, Dr. Donovan, and Dr. Jeffrey Lee. *See* CX 2 at 6 (September 10, 2001 report of Dr. Masem), CX 3 at 7 (August 29, 2001 report of Dr. Masem), CX 4 at 8 (August 23, 2001 report of Dr. Masem), CX 5 at 9-10 (August 20, 2001 report of Dr. Masem), CX 6 at11 (July 6, 2001 report of Dr. Masem), CX 7 at 12-13 (June 12, 2001 report of Dr. Masem), CX 8 at 14 (April 24, 2001 report of Dr. Masem), CX 11 at 21 (February 26, 2001 report of Dr. Masem), CX 30 at 1-61 (November 13, 2002 deposition testimony of Dr. Masem), EX 6 at 48 (February, 23, 2000 report of Dr. Barr), CX 28 at 51 (November 23, 1999 report of Dr. Donovan), and EX 4 at 34-38 (May 12, 2000 report of Dr. Jeffrey Lee). Most significantly, Dr. Masem opined during his deposition of November 13, 2001 that the claimant suffered from a cervical strain caused by the July 10, 1999 accident as well as her subsequent use of crutches. CX 30 at 21-22, 32-40, 51.

I find that such evidence is sufficient to warrant invocation of a subsection 20(a) presumption that the claimant suffered a work-related injury to her neck as a direct or indirect result of the July 10, 1999 accident.

The employer's contention that the claimant's July 10, 1999 injury did not cause any neck injury is based on the testimony and reports of Dr. Miller. *See* EX 2 at 2-29 (January 26, 2001 report of Dr. Miller and July 27, 2002 report of Dr. Miller), EX 14 (November 13, 2002 deposition testimony of Dr. Miller). According to Dr. Miller's testimony, the claimant's neck condition was entirely pre-existing and could not have been related to the July 10, 1999 accident. I find that this evidence is sufficient to rebut the subsection 20(a) presumption.

Because it has been determined that the presumption of causation has been rebutted, it is necessary to consider all of the relevant evidence to determine if a causal relationship between the claimant's neck impairment and her July 10, 1999 work injury has been established by a preponderance of the evidence. After so considering the evidence, I conclude that a preponderance of the evidence demonstrates that the claimant's July 10, 1999 accident directly or indirectly caused an injury to the claimant's neck or at least an aggravation of the claimant's pre-existing neck condition. There are five reasons for this conclusion.

First, the majority of physicians who have treated the claimant for her neck complaints have concluded that the claimant's July 10, 1999 injury at least exacerbated or aggravated her pre-existing neck condition. For example, on February, 23, 2000, Dr. Barr identified the exacerbation of the claimant's neck pain as being specifically related to her July 10, 1999 accident. CX 19 at 40. Likewise, on May 12, 2000, Dr. Jeffrey Lee found that "the [July 10, 1999] injury exacerbated a pre-existing neck injury and low back pain with underlying cervical and lumbar disk degeneration and

bulges," and agreed "that the injury resulted in aggravation of [the claimant's] neck and back condition." EX 4 at 37.

Second, although the December 30, 1999 MRI scan of the claimant's cervical spine did not indicate that there had been any worsening of the degenerative conditions shown in the June 1, 1999 MRI of the claimant's cervical spine, this fact does not preclude the possibility that the claimant suffers from myofascial neck pain resulting from the July 10, 1999 accident.

Third, although Dr. Cecilio expressed an opinion that the claimant's cervical problems are "unrelated" to the claimant's July 10, 1999 injury, he contradicted that opinion by also concluding that the claimant's work injury was a sprain that caused a "symptomatic exacerbation" of the claimant's pre-existing stenosis. CX 16 at 35.

Fourth, Dr. Masem offered a credible and well-reasoned explanation for concluding that the claimant's neck symptoms are probably related to the July 10, 1999 accident. Among other things, he testified that the claimant's post-injury use of crutches could have caused her to develop a chronic cervical strain. CX 30 at 19-21, 32-40, 51. Dr. Masem also testified that the claimant's complaints were consistent with her injury and reasonably explained by his objective physical findings. CX 30 at 24.

Fifth, although Dr. Miller is correct in giving considerable weight to the fact that the claimant failed to report any neck pain until well after her July 10, 1999 injury, he has failed to adequately address Dr. Masem's contention that the claimant's neck symptoms are due to a cervical strain attributable to her upper extremity injuries or to her post-injury use of crutches. Indeed, Dr. Miller even conceded that using crutches requires the shoulder girdle muscles, and that in some people, this could indirectly "affect the neck." EX 14 at 56. It is also noted that the claimant's first complaints of neck pain occurred during a period when she was still using crutches. EX 6 at 60, CX 23 at 46.

9. The Date of Maximum Medical Improvement for any Work-Related Neck or Cervical Spine Injury

In this case, the claimant contends that the injuries she suffered to her neck as a result of her July 10, 1999 accident have not reached the point of maximum medical improvement. The primary support for this contention is the testimony of Dr. Masem. *See* CX 30 at 22 (testimony of Dr. Masem that the claimant's neck problems are not yet permanent and stationary).

In contrast, the employer contends that the claimant's neck condition became permanent and stationary on November 12, 1999. This contention is supported by the reports and testimony of Dr. Miller. *See* EX 2 at 2-29 (January 26, 2001 report of Dr. Miller and July 27, 2002 report of Dr. Miller), EX 14 at 12 (November 13, 2002 deposition testimony of Dr. Miller).

After considering the foregoing opinions, I conclude that the claimant's cervical strain has not yet reached the point of maximum medical improvement. There are two reasons for this conclusion.

First, even though the claimant's neck complaints have continued for a prolonged period of time, Dr. Masem credibly testified that in his experience cervical strains "take a long time to resolve." CX 30 at 21.

Second, although Dr. Miller has extensively reviewed the claimant's medical records, Dr. Masem is the treating physician and has examined the claimant on many more occasions than Dr. Miller.

10. The Extent of the Claimant's Entitlement to Disability Benefits

In cases involving disputes over an injured worker's post-injury wage-earning capacity, the burden is initially on the claimant to show that he or she cannot return to his or her regular employment due to a work-related injury. *Trask v. Lockheed Shipbuilding Co.*, 17 BRBS 56, 59 (1980). If the claimant meets this burden, he or she is presumed to be totally disabled unless the employer is able to successfully demonstrate the existence of suitable alternative employment for the claimant in the geographical area where the claimant resides or was injured. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194 (9th Cir. 1988). To satisfy its burden of showing the availability of suitable alternative employment, the employer must point to specific jobs that the claimant can perform. *Bumble Bee, supra*, at 1330. In considering whether a claimant has the ability to perform particular work, the fact finder must also consider the claimant's technical and verbal skills, as well as the likelihood that a person of the claimant's age, education, and background would be hired if he or she diligently sought the possible job identified by the employer. *Hairston, supra*, at 1196; *Stevens v. Director, OWCP*, 909 F.2d 1256 at 1258 (9th Cir. 1990). If an employer makes the requisite showing of suitable alternative employment, a claimant may rebut the employer's showing, and thus retain entitlement to total disability benefits, by demonstrating that he or she diligently tried to obtain such work, but was unsuccessful. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1376 n.2 (9th Cir. 1993); *Palombo v. Director, OWCP*, 937 F.2d 70 (2nd Cir. 1991).

In this case, the claimant contends that she has been temporarily and totally disabled continuously from the time of her July 10, 1999 accident. The primary support for this contention is the testimony of Dr. Masem that the claimant's bilateral carpal tunnel syndrome precludes her from performing her regular employment as a bartender. *See* CX 30 at 1-61 (November 13, 2002 deposition testimony of Dr. Masem). In contrast, the employer contends that the reports and testimony of Dr. Miller indicate that the claimant does not have any continuing disability. *See* EX 2 at 2-29 (January 26, 2001 report of Dr. Miller and July 27, 2002 report of Dr. Miller), EX 14 (November 13, 2002 deposition testimony of Dr. Miller). Alternatively, the employer relies on the testimony of vocational expert Dr. Michael Haag that suitable alternate employment is available to the claimant. *See* EX 11 at 1-17 (September 20, 2002 report of Dr. Haag), Tr. at 59-93 (trial testimony of Dr. Haag). The employer also apparently argues that the claimant has not made a diligent effort to find alternative employment.

I find that the weight of the evidence indicates that the claimant has met her burden of establishing that her work injuries preclude her from performing her regular employment as a bartender. There are two reasons for this conclusion.

First, the contemporaneous medical records support a finding that the claimant's carpal tunnel impairments have precluded her from performing the work of a bartender. For example, on February 23, 2000, Dr. Barr opined that the claimant was unable to return to work, in part, because of left hand pain. Likewise, on September 14, 2000, Dr. Longwell noted the claimant's reports of neck and left hand pain, and based on these findings, opined that the claimant was unable to return to work. While Dr. Stehr denied that the claimant had any "significant carpal tunnel syndrome" as of December 22, 2000, he also recommended conservative management for pain of her upper extremity and neck, and recommended physical therapy for four weeks. EX 5 at 40. On February 26, 2001, Dr. Masem recommended physical therapy based on the claimant's bilateral carpal tunnel syndrome and cervical strain and opined that the claimant would be precluded from "any forceful or repetitive activities until further evaluation and treatment." CX 11 at 23. On April 12, 2001, physical therapist Kathleen Parker recommended bilateral wrist and thumb splints as well as additional physical therapy. On April 23, 2001, Dr. Masem found the claimant's bilateral carpal tunnel syndrome to be refractory to conservative treatment and he recommended thumb joint surgery. On July 6, 2001, Dr. Masem also recommended bilateral carpal tunnel surgery and opined that the claimant should discontinue working for six weeks prior to surgery. This evaluation was corroborated on December 3, 2001, by Dr. Kendrick Lee, who concluded that the claimant remained disabled and was "markedly symptomatic for her bilateral hand pain." CX 1 at 3.

Second, Dr. Masem has provided the most credible medical opinion regarding the extent of the claimant's impairments. Among other things, Dr. Masem would preclude the claimant from "repetitive manipulation, forceful grasp[ing] and pinch[ing], and heavy lifting." CX 30 at 24. In addition, Dr. Masem testified, the claimant should not engage in repetitive neck motions, such as those required by secretarial positions which might require looking back and forth between a text and a monitor. CX 30 at 25. Dr. Masem further opined that the claimant's ability to write or engage in simple or occasional manipulation is also impaired. CX 30 at 17. Moreover, Dr. Masem specifically testified that the claimant's carpal tunnel symptoms would preclude her from bartending. CX 30 at 16.

It is therefore necessary to determine if the jobs identified by the employer's vocational expert constitute suitable alternative employment for the claimant. In his September 20, 2002, vocational evaluation report, Dr. Haag outlined several positions that he thought would be suitable employment for the claimant given his understanding of her medical restrictions, age, experience, and skills. EX 11 at 5. Dr. Haag set forth the following jobs located near Oakland, California: cashier (7 employers), Gate person/cashier (1 employer), Receptionist (1 employer), unarmed security guard (6 employers), telemarketer (7 employers), appointment setter (1 employer), "telefundraisor" (1 employer), salesperson/cashier (1 employer), salesperson (4 employers), salesclerk (2 employers), outbound sales consultant (1 employer), customer service (1 employer), assistant manager (1 employer). EX 11 at 5-17. The pay for these jobs ranged from $7.00 to $12.00 per hour and most paid about $8.00 per hour. Dr. Haag also identified several jobs near Honolulu, Hawaii. EX 11 at

12-14. After reviewing the detailed job descriptions set forth in Dr. Haag's report, it appears that the claimant would be hired for at least one of the identified jobs if she were to make a good faith effort to obtain such employment.

In this regard, it is noted that it might be argued that the duties of some of the jobs might be inconsistent with Dr. Masem's deposition testimony that the claimant should not perform jobs that require pinching, grasping, writing, or manipulation. Dr. Haag provided trial testimony further describing several of the disputed positions. For the cashier positions, Dr. Haag testified that the employee would engage in keypunching for two and one half hours out of each shift. Tr. at 80-81. The cashier position would also include writing, lifting, and taking money and making change---activities which might be considered repetitive. Tr. at 81. The telemarketer position involves pressing only one button to dial, with the majority of the time spent talking and listening with a headset. Tr. at 82. A telemarketer also has to record calls and sales by handwriting or by keyboard, the frequency of which would depend on the rate of sales. Tr. at 82-83. The security guard position would require occasional locking, unlocking, and opening of doors, and lifting up to fifteen pounds using both hands. Tr. at 85-86, 90. Dr. Haag based his opinion of the claimant's lifting ability on her deposition testimony of what common objects she could lift. Tr. at 87, EX 13 at 80-82 (deposition testimony of claimant that she could lift such objects as a bible, a tray of plates, a chair, a carton of milk, or a 12 pack of beer). It is possible that the requirements of the cashier positions would exceed the restrictions recommended by Dr. Masem. However, I find that even if such jobs are unsuitable for the claimant, she could still perform the security guard, telemarketer, and customer service jobs. Indeed, Dr. Masem specifically testified that the claimant could work as a security guard if she does not have to engage in sustained writing. CX 30 at 53. Accordingly, I find that as of September 20, 2002 (the date of Dr. Haag's report) the claimant has a residual weekly wage earning capacity of $160 ($8.00 per hour times 20 hours per weeks). Her entitlement to temporary total disability benefits therefore ceased on September 19, 2002.

Finally, it is noted that the claimant testified that she made inquiries about some of the check cashing jobs identified by Dr. Haag and had actually applied for a job with a sports club that was across the street from her home. Tr. at 50, 57. However, this testimony is clearly insufficient to establish that the claimant made a diligent effort to obtain alternative employment. Indeed, the claimant admitted that she made no effort to apply for most of the jobs identified by Dr. Haag, including the security guard jobs, and even acknowledged that her only reason for making any sort of job inquiries was because she had been given "orders." Tr. at 50, 57-58.

11. The Employer's Entitlement to Special Fund Relief under the Provisions of Subsection 8(f) of the Act

Special Fund relief is available to employers only in cases where it has been determined that a claimant has a permanent disability. In this case, there has not yet been any finding that the claimant has any sort of compensable permanent disability. Accordingly, it is unnecessary to consider the employer's application for Special Fund relief.

ORDER

1. For the period commencing on July 10, 1999 and ending on September 19, 2002, inclusive, the employer shall pay the claimant temporary total disability benefits at a compensation rate of $129.49 per week.

2. The employer shall provide reasonable and necessary medical care for the treatment of the compensable injuries to the claimant's left ankle, neck, left and right carpometacarpal joints, and left and right carpal tunnels. Such medical care shall include the carpal tunnel and carpometacarpal joint surgery recommended by Dr. Masem.

3. The employer shall pay interest on each unpaid installment of compensation from the date the compensation became due until the date of actual payment at the rates prescribed under the provisions of 28 U.S.C. §1961.

4. The employer shall receive credit for any compensation paid to the claimant since July 10, 1999.

5. The District Director shall make all calculations necessary to carry out this order.

6. The counsel for the claimant shall within 20 days after service of this order submit a fully supported application for costs and fees to counsel for the employer and to the undersigned Administrative Law Judge. Within 20 days thereafter, counsel for the employer shall provide the claimant's counsel and the undersigned Administrative Law Judge with a written list specifically describing each and every objection to the proposed fees and costs. Within 20 days after receipt of such objections, the claimant's counsel shall verbally discuss each of the objections with the counsel for the employer. If the two counsel thereupon agree on an appropriate award of fees and costs they shall file written notification within ten days and shall also provide a statement of the agreed-upon fees and costs. Alternatively, if the counsel disagree on any of the proposed fees and costs, the claimant's counsel shall within 15 days file a fully documented petition listing those fees and costs which are still in dispute and set forth a statement of the claimant's position regarding such fees and costs. Such petition shall also specifically identify those fees and costs which have not been disputed by the counsel for the employer. The counsel for the employer shall have 15 days from the date of

service of such application in which to respond. No reply to that reply will be permitted unless specifically authorized in advance.

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Paul A. Mapes
Administrative Law Judge